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No. 03-683

In The
Supreme Court of the United States

ANGELA SAVARD, et al.,

Petitioners,

v.

STATE OF RHODE ISLAND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the First Circuit articulated a new standard for qualified immunity at odds with *Hope v. Pelzer*, or whether the Circuit Court properly applied *Hope* to the present dispute.

2. Whether the absolute defense of qualified immunity is available to government officials faced with two distinct lines of decisional law, and who are ultimately determined to have chosen the "wrong fork in the road."

3. Whether the law was clearly established in the First Circuit prior to March 16, 2000, that strip searching pre-arraignment detainees incarcerated for minor non-violent, non-drug-related offenses at a maximum security prison facility housing a general prison population is unconstitutional under the Fourth Amendment.

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RESPONDENTS' STATEMENT OF THE CASE

The State of Rhode Island operates the Adult Correctional Institutions ("ACI"), comprised of seven facilities.[1] One of these facilities is the Intake Service Center ("Intake"). Intake is the receiving facility for all males committed to the care, custody and control of the Department of Corrections. Approximately 16,000 inmates are committed via Intake annually. The average length of a stay at Intake is 19.5 days. Only those individuals arrested on an outstanding warrant, ordered held without bail, or who are unable to post bail come to Intake. Individuals who are merely arrested, without more, are not brought there. Intake is a maximum security facility, with a secure, fenced perimeter staffed by correctional officers twenty-four hours a day, seven days a week.

The general population at Intake consists of pre-arraignment and pre-trial detainees, newly sentenced inmates awaiting classification, pre-trial protective custody detainees, and sentenced protective custody inmates. Inmates at Intake are out of their cells approximately eight hours each day, during which time those picked up on warrants such as these Petitioners come into contact with rapists, murderers, gang members and drug dealers. The strip searches at Intake have resulted in the discovery of contraband in the past.

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[1] The First Circuit mistakenly referred to all seven facilities as maximum security facilities – not all seven have that designation. However, it has no bearing on the present case since the Intake facility – in the spotlight in this case – *is* a maximum security facility.

Prior to the District Court's decision in *Roberts v. Rhode Island*, 175 F.Supp. 2d 176 (D.R.I. 2000), a policy mandated that each inmate committed to the care, custody and control of the Department of Corrections undergo a visual strip search. That decision declared that the policy violated the Fourth Amendment's prohibition on unreasonable searches. This policy was changed on the day that the District Court entered its decision, March 16, 2000.[2]

In *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001), the First Circuit Court of Appeals affirmed the District Court, and declared that the blanket strip search policy in effect at Intake prior to March 16, 2000 violated the Fourth Amendment.[3] The specific constitutional infirmity found was the application of the policy to all entering Intake, including pre-arraignment misdemeanor detainees. The State argued that because of the unique character of Intake – a maximum security facility housing pretrial detainees charged with a wide range of offenses, as well as newly sentenced inmates and some protective custody inmates, all there upon an order of the court – the policy of strip searching all inmates upon commitment was necessary and constitutionally permissible. The State relied upon, among others, the decisions in *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983), and this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), both of which allow strip searches in circumstances quite similar to those presented daily at Intake. *Roberts* cited with approval the

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[2] This fact should weigh in favor of denial of the instant petition.

[3] Qualified immunity was never an issue in that case, since because of pleading deficiencies, Roberts was entitled only to declaratory judgment.

First Circuit's decision in *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997), which requires a showing of reasonable suspicion to strip search an individual in a single cell municipal jail.

In *Roberts*, the First Circuit agreed that the State's security concerns were legitimate and that the State had endeavored to perform the searches in a relatively private and non-intrusive manner, but ultimately found that the circumstances presented by Intake "fell somewhere between" those of *Arruda* and *Swain*. 239 F.3d at 111, 113. Based on that language, the governmental defendants in this case moved for summary judgment, asserting that the doctrine of qualified immunity barred all claims for damages.[4] Respondents (Defendants below) asserted that a reasonable prison official could not have known that implementing the strip search policy at Intake prior to *Roberts* violated the Fourth Amendment, and held that the action was barred by the doctrine of qualified immunity. On that basis, summary judgment was granted.

On appeal, a three-judge panel disagreed. However, an *en banc* court issued a 4-4 decision, ultimately affirming the District Court's grant of summary judgment on qualified immunity grounds. In its decision, the four justices who were in agreement with the District Court repeatedly discussed and ultimately applied this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). The Court did not, as Petitioners would have this Court believe, abandon *Hope* and forge a new, more relaxed standard for

[4] Petitioners filed their Complaint after the District Court's decision in *Roberts* but before the First Circuit issued its opinion.

the imposition of qualified immunity. The Circuit and District Courts applied the correct standard, and came to the only supportable conclusion – that qualified immunity should act as a complete bar to the instant action.

SUMMARY OF RESPONDENTS' ARGUMENT

The instant request for the issuance of a petition for certiorari should be denied, since there is no compelling reason to do so. The First Circuit did not abandon this Court's teachings in *Hope*, or that contained in prior precedent from this Court, or from the First Circuit. To the contrary, the Circuit Court correctly articulated, interpreted, and applied *Hope* in determining that qualified immunity was appropriately afforded to these prison officials. Petitioners would have this Court find that simply by using the phrase "clear guidance" at the end of its opinion, in *dicta* explaining their application of *Hope*, the Circuit Court abandoned all applicable caselaw and effectively encouraged government officials throughout the Northeast to abuse the constitutional rights of citizens. A simple reading of the decision is the best rebuttal of that argument.

Further, the unique nature of the Intake facility, the cornerstone of the officials' argument at the District and Circuit levels, counsels against granting certiorari in this case. The First Circuit recognized as much. *Savard*, 338 F.3d at 25, 26, 29, 31. The fact that the policy under attack was changed in March of 2000 also is a factor weighing against certiorari. The applicable three-year limitations period has run on any cases accruing prior to the policy change. *See,* R.I. Gen. Laws §§9-31-1, 9-1-25. There have

been no challenges to the new policy, which requires reasonable suspicion in non-violent, non-drug misdemeanor cases, in conformity with the District Court's decision in *Roberts*.

Finally, the District and Circuit Courts were correct in determining that qualified immunity should apply, since no reasonable official working in or overseeing the prison system in Rhode Island prior to March 16, 2000 had fair warning that their conduct was violating clearly established law. At that time, there was ample authority supporting officials' belief that the policy at Intake was constitutionally reasonable. Indeed, the First Circuit found the situation presented by Intake fell somewhere between the cases cited by Petitioners and those relied upon by prison officials. *Roberts*, 239 F.3d at 110. Cases cited by the Petitioners more commonly involved smaller, less secure facilities, and the First Circuit recognized this distinction. *Savard*, 338 F.3d at 30. All but one of the cases cited by the Petitioners were issued by courts other than the First Circuit, while prison officials believed that First Circuit and Supreme Court caselaw – *Arruda & Bell* – supported the policy at the ACI. In short, there was a "fork in the road" of decisional authority, one upholding strip search policies as reasonable under the Fourth Amendment in facilities similar to Intake – maximum security facilities. The second determined strip searches at local jails were constitutionally impermissible. Prison officials reasonably believed that the first line of cases was more applicable to their situation than the latter. Indeed, the procedural history of this case demonstrates that even federal judges cannot agree on the clarity of the law.

ARGUMENT

I. There Is No Compelling Reason To Grant Certiorari.

Rule 10 of the Supreme Court Rules provides that a writ of certiorari is a matter for judicial discretion, and will be granted *only* for compelling reasons. That Rule emphasizes that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law, as Petitioners urge in the instant case. The First Circuit's decision in this case does not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit, or with a decision of any state court of last resort.

Further, the policy regarding strip searches was changed in March of 2000, and is no longer used in the Rhode Island prison system.[5] "Rhode Island abandoned the proscribed policy from and after the date of the district court's decision . . . ." *Savard,* 338 F.3d at 26. Finally, the core argument offered by prison officials throughout this litigation is that Rhode Island's prison system is unique – there are no municipal or county facilities as most other states have. "Unlike other states, Rhode Island has no regional or county detention facilities. It operates only a single, all-purpose penitentiary: the ACI." *Savard,* 338 F.3d at 26. The First Circuit recognized this fact, and it played an important role in the outcome. This distinction makes this case unique and the holding of questionable

[5] Although Petitioners might lead this Court to believe that they represent "thousands" of others (Petition, p. 2, 4), the Motion to Certify a Class was not ruled on by the Court prior to the entry of summary judgment. (Pet. App. 57).

value in any other jurisdiction. Finally, the petition should be denied since the District and Circuit Courts were correct in determining that qualified immunity acts as a complete bar to an action for damages.

II. The First Circuit Did Not Formulate A New Standard For The Application Of Qualified Immunity.

The First Circuit correctly identified and discussed as the central issue of this dispute:

> . . . whether the law was clearly established, prior to March 17, 2000, to the effect that prison officials need at least reasonable suspicion before subjecting misdemeanant arrestees to strip searches when introducing them into the general population of a maximum security prison, and whether a reasonable prison official, situated similarly to the defendants, would have understood at that time that the policy in place at the ACI transgressed the Constitution.

Savard, 338 F.3d at 27.

It is clear, then, that the test applied by the First Circuit was wholly consistent with this Court's teachings on the subject. Petitioners have extrapolated two innocuous words from the entire opinion, and argue that this phrase establishes an entirely new and more relaxed standard for qualified immunity. Nothing could be further from the truth.

Throughout the opinion below, the Circuit Court discussed and applied *Hope* and other cases discussing the defense of qualified immunity. Whether the words "fair warning" or "clearly established" were used, the yardstick

by which the state of the law in March of 2000 was measured was a correct one. Both of those standards remain appropriate in determining whether qualified immunity should apply. A quick perusal of the First Circuit's decision amplifies the weaknesses of Petitioners' argument:

> Where, as here, a party's entitlement to summary judgment hinges on a claim of qualified immunity, we must balance the need to vindicate constitutional rights against the need to insulate public officials from civil litigation that might unduly inhibit the assiduous discharge of their duties. In balancing those competing needs, we employ a three-part algorithm . . . . [T]he second question deals with fair warning; it asks whether the law was clearly established at the time of the constitutional violation.

Savard, 338 F.3d at 27 (citations omitted).

> We must determine whether the law was clearly established prior to March 17, 2000, to the effect that prison officials need at least reasonable suspicion before subjecting misdemeanant arrestees to strip searches when introducing them into the general population of a maximum security prison, and whether a reasonable prison official, situated similarly to the defendants, would have understood at that time that the policy in place at the ACI transgressed the Constitution.

Id.

> . . . we begin our analysis with an examination of whether the law can be said to have been "clearly established" at or before the critical time . . . .

Id. (citations omitted).

> The bottom line is that the qualified immunity defense prevails unless the unlawfulness of the challenged conduct is "apparent."

Id. at 28 (citation omitted).

> . . . the Defendants did not have fair warning, prior to March 17, 2000, that their conduct was unlawful.

Id. at 33.

The two-word phrase that forms the basis for the instant Petition is contained on the last page of the decision, and constitutes mere *dicta*. This is too slender a reed upon which to rest certiorari in any case.

III. The Defense of Qualified Immunity Should Be Available To Government Officials Faced With Two Distinct Lines Of Caselaw, And Who Are Ultimately Determined To Have Chosen The Wrong "Fork In The Road".

The First Circuit concluded its *en banc* opinion by stating: "If judges can span the spectrum on this sort of constitutional question, it would certainly be unfair to hold the defendants liable for doing nothing more blameworthy than guessing incorrectly about how the courts ultimately would resolve the issue." *Savard*, 338 F.3d at 33 (citation omitted). That Court in *Roberts* had earlier decided that "[t]he institutional security concerns in play here fall somewhere between those exhibited in *Swain*, which were insufficient to support a search, and those in *Arruda* and *Bell*, which made broad based searches without individual suspicion reasonable." 239 F.3d at 111. To hold that a public official has forfeited qualified immunity and faces monetary liability under section 1983 in such a situation

would be untenable, and would constitute an extreme departure from all existing caselaw. "The law does not expect a public official, faced with the need to make an objectively reasonable real-world judgment, to anticipate precisely the legal conclusions that will be reached by a panel of federal appellate judges after briefing, arguments, and full-fledged review." *Roberts*, 239 F.3d at 111. An official's claim of qualified immunity will be defeated if, "in light of preexisting law" the unlawfulness of his conduct was "apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This Court should be mindful, in determining what law is "clearly established" for qualified immunity purposes, that the vast majority of state officers are *not* lawyers, and rely on the relevant guidance of others in the conduct of their duties. They cannot be expected to be "seers in the crystal ball of constitutional doctrine" any more than "high state officials." *Westberry v. Fisher*, 309 F.Supp. 12, 17 (D. Me. 1970). They are not "charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. 547 (1967).

This Court has recognized that "[i]f judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy", *Wilson v. Layne*, 526 U.S. 603 (1999) and thus should concur with the First Circuit, who refused to "require public officials to foretell the course of constitutional laws with absolute accuracy in order to obtain the balm of qualified immunity." *Savard*, 338 F.3d at 33. This, coupled with the deference which must be afforded prison officials, *see Bell v. Wolfish*; *Block v. Rutherford*, 468 U.S. 576 91984) makes it clear that qualified immunity should attach in this case.

Any discussion of qualified immunity must now begin with an examination of *Hope v. Pelzer*, *supra*, decided only weeks after Judge Lisi issued her decision in this case. *Hope* was initially met with much consternation – government officials and their counsel wondering why the alteration of the now comfortable qualified immunity standard of *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), and its progeny. When the decision is fully understood, and the cases that have subsequently applied its teachings are reviewed, it becomes clear that *Hope* did not radically change the law. "*Hope* does not purport to overrule, modify, or even question anything the Supreme Court had earlier said about qualified immunity. The Supreme Court decisions preceding *Hope* are still good law." *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002). Indeed, the most radical thing that can be said about *Hope* is that it articulated the "obvious violation" exception to the requirement that the law be "clearly established" in order to overcome a qualified immunity defense. 122 S.Ct. at 2514. In other words, if the actions complained of are *so* egregious that a reasonable official should know that a constitutional line has been crossed, qualified immunity will provide no defense. *Willingham v. Loughnan*, 321 F.3d 1299 (11th Cir. 2003). If the particular facts of a case are "so far beyond the hazy border" between constitutionally acceptable and impermissible, *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997), the mere fact that no prior official acted so egregiously, and therefore there is a dearth of caselaw with similar facts, a Defendant is not allowed one "free bite."[6]

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[6] There are cases where the facts are determined to be *so* egregious that no decision is required before a defendant has "fair warning" that

(Continued on following page)

Hope is not particularly helpful or applicable in this case, because unlike there, where there was no caselaw dealing with the specific (or even similar) facts alleged (arguably because of their egregious nature), in the instant dispute there are *two* distinct lines of decisional law – both in this Circuit and elsewhere. In short, *Hope* does little to assist the Court in this situation.

Petitioners make much of the fact that out of the many cases cited by J. Lisi in her opinion, one was remanded by this Court for further consideration in light of *Hope*.[7] Judge Lisi cited the Eleventh Circuit's decision in *Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001) for the proposition that the applicable law in the case *sub judice* was not "developed in such a factually defined context that the individual defendants should have been aware that they were acting illegally when they either ordered or performed the searches in question." *Savard* slip op. at 13 (Petitioner's Appendix, p. 70). Petitioners' argument relative to the *Thomas* case in misleading by virtue of its incompleteness.

Following *Hope*, this Court remanded *Thomas* for reconsideration. *See* 536 U.S. 953 (2002). On remand, the Eleventh Circuit issued an even stronger opinion, holding that while the strip searches involved were unreasonable, the individual defendants were nonetheless entitled to

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his conduct is constitutionally impermissible. *See, e.g., United States v. Lanier*, 520 U.S. 259 (1997) (sexual assault by judge in chambers); *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000) (police officer ordering dog to viciously attack plaintiff); *Smith v. Mattox, supra*, (arresting officer broke arm of "docile" arrestee).

[7] The First Circuit did not cite this case.

qualified immunity for their actions. *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003) ("*Thomas II*").

Thomas II recognized that *Hope* articulated "the salient question" as "whether the state of the law [at the time of the action in question] gave [the officers] fair warning that their alleged [actions were] unconstitutional." 323 F.3d at 953, citing *Hope*, 536 U.S. at 741. *Hope* was also interpreted as teaching that the notice to officials must be a "fair *and clear* warning." *Hope,* 536 U.S. at 744 (citation omitted).

As stated in *Thomas II*, the balancing test used to determine the reasonableness of a strip search under the Fourth Amendment:

> will, in most instances, call for . . . officials to speculate as to whether a court applying the balancing test to specific facts would find a search unreasonable. As this court has noted, where the applicable legal standards is a highly general one, such as 'reasonableness', preexisting case-law that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law.

323 F.3d at 954 (citations omitted).

The Eleventh Circuit found the case put forth by the plaintiff as "clearly establishing" the constitutional right to be free from a strip search under the specific facts involved was:

> so different from the facts in this case that [the case plaintiff cited] offers little guidance: Defendants could not have compared their situation

> with the situation in [plaintiff's case] and found that the comparison fairly and clearly warned that a 'strip search' of this kind would be unconstitutional.

Id. Particularly applicable to the present case is the admonition that "public officials 'are not obligated to be creative or imaginative in drawing analogies' nor do we require them to 'construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority.'" *Id.* fn.6 (citation omitted).

The post-*Hope* decision of *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001) is also particularly instructive. In holding that a strip search violated the Fourth Amendment, but affording qualified immunity, this case placed great weight on the fact that Wilson was placed in the general population of the jail, where she had the opportunity to interact with others. The Eleventh Circuit affirmed *Bell's* recognition that "[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." 251 F.3d at 1344. Given that language, *Wilson* held that it was not unreasonable for someone in Sheriff Jones' position to believe that blanket strip searches of newly admitted detainees were justified based on the serious risk that smuggled weapons and other contraband posed to the jail's security. The fact that *Bell* upheld a more intrusive search than the one in *Wilson* (or that at issue here) further weighed against a conclusion that *Bell* should have put Sheriff Jones (or these ACI officials) on notice that the strip search policy was unconstitutional.

In *Robles v. Prince George's County, Md.*, 302 F.3d 262 (4th Cir. 2002), the Fourth Circuit granted qualified

immunity to officers who had handcuffed an arrestee to a pole in a deserted shopping center in the middle of the night for ten minutes. That Court held that qualified immunity, and therefore liability, turns on what notice the officers had that their conduct violated federal constitutional law. Even in light of facts similar to *Hope*, the distinguishing factors made the conduct not apparently unconstitutional.

On denial of rehearing *en banc*, *Robles v. Prince George's County, Md.*, 308 F.3d 437 (4th Cir. 2002), the Chief Judge of that Circuit (concurring) wrote: "What the panel was unwilling to do was to take this holding of first impression and strip the qualified immunity defense of any notice component whatsoever." The Fourth Circuit did not read *Hope* as abandoning the requirement of notice. *Accord, Vinyard v. Wilson*, 311 F.3d at 1352: "When fact specific precedents are said to have established the law, a case that is fairly distinguishable (or distinguishable in a fair way) from the circumstances facing a government official cannot clearly establish the law for the circumstances facing that government official – so that qualified immunity applies."

In *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002), an *en banc* panel upheld the grant of summary judgment based on qualified immunity, the Court recognizing that although the plaintiff's theory was recognized at a general level, that did not necessarily provide an officer with notice that his specific actions created the danger that ultimately became the focus of the case. The Fifth Circuit held that qualified immunity should be granted if a reasonable official would be left uncertain of the law's application to the facts confronting him. These cases make it crystal clear that, even since *Hope*, notice is required

that what an officer is doing is clearly unconstitutional before personal liability may attach.

IV. The Law Was Not Clearly Established, And Did Not Give Reasonable Prison Officials Fair Warning, That Prior To March 16, 2000 It Was Constitutionally Impermissible To Strip Search All Inmates Committed To The Care, Custody And Control Of A Maximum Security Facility Housing A General Prison Population.

It is hornbook law – the doctrine of qualified immunity precludes suits for money damages against state officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, supra. Qualified immunity is "an immunity from suit rather than a mere defense to liability [which] . . . is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The qualified immunity defense exists not only to shield officials from liability for damages, but also to protect from "the general costs of subjecting officials to the risks of trial – of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816. Qualified immunity leaves "ample room for mistaken judgments" and protects "all but the plainly incompetent or those who knowingly violate the law." *Bilida v. McCleod*, 211 F.3d 166, 174 (1st Cir. 2000), citing *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986). Without proper immunity for reasonable *mis*interpretation, governmental actors would be placed in the untenable position of facing the burdens of litigation and the risk of liability for guessing incorrectly

when the constitutional provision itself provides little guidance.[8] Petitioners do not accept the fact that prevalence on the merits of their constitutional claim does not equal a payoff from the state fisc. More must be shown before the doors of the treasurery are opened. A "claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Mitchell v. Forsyth*, 472 U.S. 511, 527-528 (1985).

Qualified immunity seeks to ensure that governmental defendants reasonably can anticipate when their conduct may give rise to liability by attaching liability *only if* the contours of the right violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Jenkins v. Talladega City Board of Education,* 115 F.3d 821, 825, n.3 (11th Cir. 1997). It is not enough for the constitutional right to be "clearly established" at a highly abstract level; what matters is whether in the circumstances faced by the official, he should reasonably have understood that his conduct violated clearly established law. *Berthiaume v. Caron*, 142 F.3d 12, 15 (1st Cir. 1998).

In *DeAbadia v. Izquierdo Mova*, 792 F.2d 1187 (1st Cir. 1986), the First Circuit stated:

> . . . we are presently concerned not with the correctness of defendants' determination, on the one hand, nor their subjective state of mind, but of the 'objective reasonableness' of their conduct . . .

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[8] In this case, the Fourth Amendment prohibits only "unreasonable" searches.

> *Harlow* demands not prescience, but subjective good faith.
>
> 792 F.2d at 1193.

In the First Circuit, there is a three-step inquiry for evaluating qualified immunity claims: (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right. *Nelson v. Kline*, 242 F.3d 33 (1st Cir. 2001); *Abreu-Guzman v. Ford*, 241 F.3d 33 (1st Cir. 2001).

The cases relied upon by the State throughout the years supported its reasonable belief that the strip search policy was constitutional.[9] In ruling to the contrary, *Roberts* offered the first reported decision in this country holding that officials at a maximum security facility containing a general prison population could not strip

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[9] Indeed, even today one commentator laments that "[t]he lower Federal Courts have not yet settled upon a consistent approach that conforms to Supreme Court precedent for the assessment of the constitionality of strip search policies that apply to arrestees and detainees." and "The varied approaches lower courts have taken to analyzing the question of arrestees' and detainees' rights to be free from unreasonable strip searches demonstrate the level of confusion that exists in this case of the law." Deborah L. MacGregor, *Stripped Of All Reason? The Appropriate Standard For Evaluating Strip Searches Of Arrestees And Pre-Trial Detainees In Correctional Facilities*, 36 Colum. J. L. & Soc. Probs. 163 (Winter, 2003).

search those about to be introduced into the facility.[10] That decision could not be harmonized with opinions in *Arruda v. Fair*, supra and *Wood v. Clemons*, 89 F.3d 922 (1st Cir. 1996). In fact, the Circuit Court held that the situation presented by Intake fell in a completely new area of strip search law. *Roberts*, 239 F.3d at 111. *Roberts* also had to explain why it was not inconsistent with this Court's pronouncement in *Bell* that pretrial detainees may be subjected to a strip search in a large general population facility.

In *Bell*, the only strip search decision issued by this Court,[11] Chief Justice Rehnquist examined the constitutional rights of the pretrial detainee. In *Bell*, as in the present case, pretrial detainees were held in a large general population facility. However, the instant case arguably provided a more compelling background for allowing strip searches. *Bell* did not involve a maximum security facility. Rather, it was a detention center for

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[10] For the first time in this litigation, Petitioners make light of the maximum security designation held by Intake. *See* Petition, p. 1 ("so-called 'maximum security facility.'"); p. 3 ("which respondents have labeled a 'maximum security facility'"); p. 7 ("so-called 'maximum security facilities'"); and p. 10 ("*in what government authorities call a 'maximum security facility'*") (emphasis in original). Petitioners did not question the maximum security designation of Intake, either in *Roberts*, or in the present case. It is simply too late now. Whether they like it, or understand it, Intake *is* a maximum security facility, and was recognized as such by the courts below. *See Roberts I*, 175 F.Supp. 2d at 181; *Roberts II*, 239 F.3d at 109, 111; *Savard I*, No. 00-261ML, Pet.App. 58, *Savard II*, 338 F.3d at 27, 29, 30, 31 and 33. Indeed, even the dissent in *Savard II* respected the maximum security designation of Intake. *Id.* at 38, 40.

[11] Petitioners ignore *Bell*, never citing or discussing the paramount importance of this decision to the case *sub judice*.

federal pretrial detainees. It was reasonable for the State to believe that *Bell* was controlling precedent, applicable to Intake.

In *Ward v. County of San Diego*, 791 F.2d 1329 (9th Cir. 1986), the Ninth Circuit held that there are not one, but two articulable and overlapping reasons that could uphold a strip search policy. One of those reasons is custodial arrest, always present at Intake. The other is the "reasonable suspicion" standard. In *Arruda v. Fair,* the First Circuit made it clear that the ultimate Fourth Amendment question is whether a prison search policy is reasonable under *all of the circumstances. Wood v. Clemons* teaches that the meaning of reasonableness for Fourth Amendment purposes is highly situational. "A search that is reasonable in the prison environment may not be in other context less fraught with serious security dangers." 89 F.3d at 928. A close examination of the two distinct lines of strip search cases (custodial and non-custodial arrests) highlights two distinct outcomes: In the first, strip searches have been upheld as constitutionally permissible when individuals are co-mingling within a general prison-not jail-population. In the second, the strip search is found to violate an individual's constitutional rights to be free from unreasonable search and seizures because of the circumstances of those cases i.e., an individual held in a jail cell alone for a short time, with no transportation and no co-mingling. In the latter, there are often facts shocking to the Court, often occurring in municipal or county jail facilities where an inmate is kept for only a short period of time in a cell alone. *Compare Logan v. Shealey*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub. nom., Clement v. Logan*, 455 U.S. 942 (1982) (strip search of female DWI arrestee held unreasonable

when "at no time would [plaintiff] or similar detainees be intermingled with the general jail population"); *Swain v. Spinney*, supra (arrestee's strip search performed in local jail cell under circumstances which could be interpreted as retaliatory held unreasonable); and *Watt v. Richerson*, 849 F.2d 195 (5th Cir. 1988) (4th Amendment held violated during strip search at local jail when woman was released after 5-10 minutes, officials knew she had bail money on the way, and she was never co-mingled with general jail population); *with Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983) (strip search held constitutionally permissible where mother arrested one month after assault on stepdaughter – fact of incarceration with general population coupled with reasonable nature of search was critical); *Dobrowolsky v. Jefferson County, Kentucky*, 823 F.2d 955 (6th Cir. 1987) (strip search upheld as reasonable when pretrial detainee was not searched until he was about to be introduced into the general prison population); and *Roscom v. City of Chicago*, 570 F.Supp. 1259 (N.D.Ill. 1983) (upheld strip search as reasonable as to pretrial detainee arrested for bad checks, since the county could "reasonably consider any [detainee] could be carrying weapons or contraband, either brought with detainee into the county jail or procured from other persons in the holding cell."). A review of these decisions makes it clear that co-mingling with a general population and the security designation of the facility has been the lynchpin in determining whether a strip search is constitutionally permissible.

A recent case from the Eleventh Circuit, *Evans v. City of Zebulon*, No. 02-16424 2003 WL 22707338 (11th Cir. November 13, 2003), points out that even as of 2001 the law was unclear that reasonable suspicion was required to conduct a strip search or body cavity search of an

arrestee detained in the general jail population. 2003 WL 22707338, *5, citing *Wilson v. Jones*, supra. In *Evans*, the facts were much more egregious than those offered herein. The officers in *Evans* apparently manhandled the plaintiffs, inserted a billy club or flashlight into the anus of one plaintiff, and used the same object to manipulate the testicles of both plaintiffs, who were searched in the presence of each other. That Circuit held that the "general legal principles stated in *Bell* and *Justice* do not apply with such obvious clarity to the facts of this case that no reasonable officer could have believed the manner in which the strip searches of the appellees were performed was constitutional." 2003 WL 22707338, *7.

This Court has recognized the ever present threat of smuggling in a prison setting: "it is not unreasonable to assume that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates." *Block v. Rutherford*, 468 at 587. In *Block* the Court took judicial notice that drugs are a problem in virtually every penal and detention center in the country. 468 U.S. at 588-89. In *Bell,* this Court found that "there is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates." 414 U.S. at 546, n. 28. In *Arruda*, the First Circuit, in giving deference to prison officials, upheld a strip search policy because it involved a maximum security facility containing dangerous prisoners, and because there was a lengthy history of prison contraband as well as instances of guards smuggling. Except for the last point, all of the factors in *Arruda* are present at Intake. In *Cochrane v. Quattrochi*, 949 F.2d 11 (1st Cir. 1991), the First Circuit noted that a prisoner admitted using contraband drugs ten to twenty times while incarcerated in the State's prison system.

The above discussion of the law prior to March 16, 2000, makes it clear that the law was *not* clearly established, that prison officials did not act unreasonably, and that qualified immunity was correctly afforded the individual defendants herein.

CONCLUSION

The First Circuit and the District Court were correct in holding that the instant action for damages was barred. It is true in the usual case that the doctrine of qualified immunity is necessary if State government is to effectively operate. This case cries out for the application of that doctrine as a complete bar to the Section 1983 claims, since this Court has "emphasized that [it is] unwilling to substitute [its] judgment on the difficult and sensitive matters of institutional administration and security for that of (those running the institutions)." *Block v. Rutherford*, 468 U.S. at 588. Should this Court decline to give these individuals the "breathing space" they need to perform their job, the greater the potential for state employees to incur litigation costs and potential judgments under section 1983. Given that the State not only indemnifies their employees against such judgments, but also assumes the costs of their defense, these financial costs fall directly upon the State. Further, although Section 1983 lawsuits undoubtedly deter some unlawful behavior, they can, absent appropriate qualified immunity protection, make it more difficult to recruit and retain high-quality employees. Indeed, this Court has long recognized these and other "social costs" of suits against government officials, including "the expense of litigation, the diversion of official energy from pressing public issues,

and the deterrence of able citizens from acceptance of public office," as well as "dampen[ing] the ardor of all but the most resolute, or the most irresponsible" government officials "in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 818.

Respondents therefore respectfully request that the instant petition be denied.

Respectfully submitted,

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